IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

JAMES EDWARD FOBBER
SS# 415-70-5324 and
CORETTA MAY FOBBER
SS# 315-36-1589,

Debtors.

No. 97-21408
Chapter 7

M E M O R A N D U M

APPEARANCES:

JAMES EDWARD FOBBER
CORETTA MAY FOBBER
1301 Skyline Drive
Stigler, Oklahoma 74462
Pro se

L. KIRK WYSS, ESQ.
Post Office Box 1778
Morristown, Tennessee 37816-1778
Chapter 7 Trustee

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This case came before the court for hearing on August 10, 1999, upon the debtors' "MOTION TO DISMISS FOR IMPROPER VENUE" and "MOTION TO SET ASIDE PREVIOUS AGREED ORDER," both filed on July 9, 1999, the chapter 7 trustee's responses in opposition thereto filed on July 22, 1999, the "AMENDED NOTICE TO CREDITORS AND PARTIES IN INTEREST OF TRUSTEE'S PROPOSED SALE OF ASSETS" filed on July 15, 1999, and the debtors' "REQUEST FOR HEARING CONCERNING TRUSTEE'S PROPOSED SALE OF ASSETS" filed on July 23, 1999. For the following reasons, the debtors' motions will be denied and the chapter 7 trustee's proposed sale will be allowed to proceed. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(A)(H)(N) and (O).

I.

Prior to considering the evidence which was presented to the court at the hearing on August 10, 1999, the court believes that it is necessary to set forth some of the procedural history in this case and the debtors' prior bankruptcy case to fully understand the issues presented. The debtors' first bankruptcy case was a chapter 7 filed in this district on May 22, 1996, case no. 96-21101. The petition listed the husband's address as Route 1, Bulls Gap, Tennessee, the wife's address as 1301 Skyline Drive, Stigler, Oklahoma, and recited under the venue

section of the petition that "debtors have had a residence in this District for 180 days immediately preceding the date of this petition." The only assets scheduled by the debtors in that case was $3,000.00 in household goods, $300.00 in miscellaneous clothing, a 1986 Cadillac valued at $500.00 and a 1993 Ford 4x4 valued at $10,000.00 on which there was a lien in the amount of $12,000.00. The debtors listed a secured debt of $50,000.00 on a 1994 "KW over road tractor" and $397,000.00 in unsecured, nonpriority debt. On August 22, 1996, the chapter 7 case was dismissed without opposition from the debtors upon the U.S. trustee's motion due to the debtors' failure to attend the mandatory 11 U.S.C. § 341(a) meeting of creditors, which had been set on four separate occasions. The court notes that shortly before the hearing on the dismissal, the court had denied the debtors' motion to set aside an order entered July 16, 1996, granting Ozark Financial Services, Inc. relief from the stay to allow the repossession and sale of its collateral, a 1994 Kenworth T800 tractor. Pending at the time of the dismissal was a motion for relief from stay filed by PACCAR Financial Corp. which sought permission to repossess and sell a 1993 Kenworth tractor.

The debtors' current chapter 7 case was filed on June 4, 1997. As in the first case, the petition listed the husband's

address as Route 1, Bulls Gap, Tennessee, the wife's address as 1301 Skyline Drive, Stigler, Oklahoma, and recited that the "Debtors have had a residence in this District for 180 days immediately preceding the date of this petition." The same assets that were scheduled in the first case were listed in this case, but no secured debts were scheduled and unsecured, nonpriority debts which had been scheduled at $397,000.00 in the first case totaled $246,000.00 in the present case. Counsel for the debtor in both the first chapter 7 case and at the initiation of the present case was John S. Anderson, Esq.

On September 3, 1997, the U.S. trustee filed a "MOTION TO EXTEND TIME TO OBJECT TO DISCHARGE AND FILE MOTION TO DISMISS PURSUANT TO 11 U.S.C. § 707" which alleged that "there are numerous deficiencies in the schedules which are material to the question of whether or not the case should be dismissed due to substantial abuse or bad faith; or whether or not debtors' discharge should be denied pursuant to § 727." An agreed order was entered on September 25, 1997, extending the deadlines by an additional ninety days in which to object to discharge and to file a motion to dismiss.

On September 23, 1997, the chapter 7 trustee filed a "MOTION TO COMPEL" alleging that the meeting of creditors was held on July 10, 1997, and that during that meeting "it became

abundantly clear that the debtors had failed to list substantial personal property and real estate and had failed to disclose the formation of a family trust into which property had been placed while the debtors were insolvent." The trustee recited that debtors' counsel, Mr. Anderson, had assured the trustee that amendments of the statement of financial affairs and schedules would be forthcoming, but none had been filed. The trustee concluded the motion by alleging that "substantial property has gone unreported and that a family trust is a fraudulent conveyance and that further the debtors are withholding information vital to the estate." An agreed order was entered regarding that motion on October 8, 1997, giving the debtors seven days to "fully amend their schedules, reflect all property and creditors, and to provide full information to the trustee" and noted that if the debtors failed to comply, the debtors could be held in contempt.

On November 3, 1997, the chapter 7 trustee filed a "NOTICE OF NONCOMPLIANCE" wherein he requested that the court issue a certificate of contempt, the debtors having failed to comply with the October 8 order. The trustee stated that "partially amended schedules were submitted on October 22, 1997, but that these partially amended schedules do not properly reflect all creditors known to the debtors and the Trustee, that the

schedules are unsigned by the debtors, and that the complete address of the major creditor in Oklahoma was incomplete." On November 6, 1997, the court entered an order directing the debtors and their counsel to appear for hearing on December 2, 1997, and show cause why sanctions should not be imposed for the debtors' failure to comply with the agreed order. Thereafter, the debtors and the chapter 7 trustee tendered an agreed order entered by the court on November 18, 1997, which recited "that property conveyed by the debtors to the James and Coretta Fobber Trust and also known as the James Edward and Coretta May Fobber Trust is properly property of the bankruptcy estate ... and available to the Trustee for liquidation as he sees fit" (the "Agreed Order").

Upon the request of the parties, the show cause hearing on December 2, 1997, was adjourned until December 16, 1997. On December 8, 1997, the debtors, through attorney T. Wood Smith, Esq., moved to set aside the Agreed Order. The motion recited that the debtors had just retained the services of Mr. Smith, that "the Agreed Order may have been filed with the erroneous agreement of John Anderson, former counsel for the debtors" and that the debtors had discharged their previous counsel at the time the Agreed Order was filed. On December 11, 1997, John Anderson moved for permission to withdraw as counsel for the

debtors, reciting, *inter alia*, that "Debtors have chosen to retain another attorney and have stated that they no longer wish for me to represent them." An agreed order substituting Mr. Smith for Mr. Anderson as counsel for the debtors was entered on December 15, 1997.

On December 15, 1997, the U.S. trustee filed an "OBJECTION TO DEBTOR'S MOTION TO SET ASIDE AGREED ORDER OR IN THE ALTERNATIVE TO FURTHER EXTEND THE TIME TO OBJECT TO DISCHARGE" in which she alleged that a previous extension to file an objection to discharge or a motion to dismiss for substantial abuse had been granted through December 8, 1997, and, in reliance upon the Agreed Order, no objection to discharge or motion to dismiss had been filed. The proceeding memorandum for the adjourned show cause hearing and the hearing on the debtors' motion to set aside the Agreed Order held on December 16, 1997, recites that an agreed order was to be tendered providing the debtors ten days to file a corrected petition and schedules, and that the debtors' motion to set aside and the U.S. trustee's objection was continued until January 6, 1998. By motion filed December 29, 1997, the debtors through counsel requested that they be allowed through January 2, 1998, in which to file these documents. That motion was granted by order entered January 8, 1998.

The debtors through Mr. Smith as counsel filed on December 19, 1997, a "NOTICE OF NEW ADDRESS" which listed the wife's Stigler, Oklahoma address as the new mailing address for the debtors. On January 2, 1998, the debtors filed an amended chapter 7 petition, statement of financial affairs and schedules along with a "NOTICE" advising that "[t]he attached Amended Petition and Schedules are each amendments to the original Petition and Schedules filed in this case on June 4, 1997, and replace the original Petition and Schedules." The amended joint petition listed both the debtors' addresses as Route 1, Bulls Gap, Tennessee. The amended schedules and statement of financial affairs were substantially more detailed and complete than the original schedules and statement. In response to question no. 4(a) on the statement of financial affairs, the debtors stated that they had been defendants in four civil suits within the last year and in response to question no. 10 which asks for transfers of property within the last year, the debtors noted that property worth $290,000.00 had been transferred to "James Edward Fobber and Coretta May Fobber Trust, formerly revocable trust, made irrevocable trust", "created 12-9-94." In response to question no. 16, the debtors reported that from 1994 through the present, they had been in the restaurant business known as Westside Restaurant and the trucking business known as

Fobber Trucking, both located in Stigler, Oklahoma. The amended Schedule A listed five parcels of real property in Stigler, Oklahoma, including the debtors' residence, their daughter's home and 80 acres, the Westside restaurant property, a 40-acre tract of land and a 160-acre tract, all held in the name of James Edward Fobber and Coretta May Fobber Trust, having a total value of $240,000.00. Schedule B listed $120,600.00 in personal property, including a promissory note owed to the trust in the amount of $50,000.00 and three tractors each valued at $20,000.00. Secured claims in the amount of $178,500.00, unsecured, priority claims of $1,800.00, and unsecured, nonpriority debts totaling $206,370.00 were also scheduled.

On January 6, 1998, counsel for the debtors appeared at the continued hearing on the motion to set aside the Agreed Order and announced that the debtors would be withdrawing their motion. On January 7, 1998, the debtors filed a "WITHDRAWAL OF MOTION TO SET ASIDE PREVIOUS AGREED ORDER." Thereafter, on January 29, 1998, the debtors filed a "MOTION TO DISMISS CHAPTER 7 CASE" alleging that they "possess the ability to pay their creditors, and wish for the opportunity to do so." Alternatively, the debtors moved for "a reasonable time to convert this case to a Chapter 13 case." Both the chapter 7 trustee and the U.S. trustee filed objections to the dismissal

motion, citing the debtors' alleged attempt to hide assets and arguing that a dismissal would prejudice creditors as there were assets available for liquidation which had been brought into the bankruptcy estate by way of the Agreed Order. After notice and a hearing, the court by order entered March 5, 1998, denied the motion to dismiss, but granted the motion to convert. The order provided that "[i]n the event of default by the debtors while in chapter 13, the case will be reconverted to chapter 7 and not dismissed."

On April 2, 1998, the debtors filed a "CHAPTER 13 PLAN" and a confirmation hearing to consider that plan was scheduled for June 2, 1998. On May 15, 1998, an "OBJECTION TO CONFIRMATION BY CHAPTER 13 TRUSTEE" was filed alleging that the plan proposed a 100% dividend to creditors, but "[b]ased on claims filed and/or scheduled the plan will not result in the proposed 100% dividend and is, therefore, presently not feasible in accordance with 11 U.S.C. § 1325(a)(6)." At the debtors' request, the confirmation hearing was adjourned to August 11, 1998. On August 11, the hearing was adjourned at the debtors' request to September 29, 1998. On September 29, the hearing was adjourned at the debtors' request to October 13, 1998. On October 13, the confirmation hearing was adjourned to November 11, 1998, again at the debtors' request.

On October 13, 1998, the debtors filed a "MOTION TO TRANSFER CASE" to "the district in the State of Oklahoma in which the debtors reside" alleging that "[i]t would benefit the creditors as well to have this case transferred to Oklahoma for further disposition." At the hearing on the motion, counsel for Farmland Industries, Inc., one of debtors' creditors, appeared in opposition to the motion to transfer case and argued that the debtors had voluntarily chosen this forum and any transfer now would prejudice creditors. Upon the conclusion of that hearing, an order was entered on November 16, 1998, denying the debtors' motion to transfer case, sustaining the chapter 13 trustee's objection to confirmation of debtors' plan, and providing the debtors fifteen days from entry of the order "to submit a confirmable plan or the case will be reconverted to chapter 7 without further notice or hearing."

On November 25, 1998, the debtors filed a "MOTION FOR EXTENSION OF TIME" requesting an additional ten days to file a confirmable plan. That motion was granted by order entered December 1, 1998. On December 7, 1998, the debtors filed an "AMENDED CHAPTER 13 PLAN" which proposed a dividend to unsecured creditors of 5% to 20% and a monthly payment of $1,200.00. In response, the chapter 13 trustee an "OBJECTION TO CONFIRMATION AND MOTION TO RECONVERT TO CHAPTER 7" on December 18, 1998,

asserting that the plan was not feasible as required by 11 U.S.C. § 1325(a)(6), did not meet the best interests of creditors test required by § 1325(a)(4), and did not meet the good faith requirements of § 1325(a)(3). In support of her motion to reconvert, the chapter 13 trustee alleged that the debtors had accrued a plan arrearage of $3,600.00 and had not made a plan payment since July 31, 1998.

At the hearing on the motion and objection held January 11, 1999, the chapter 13 trustee and U.S. trustee disclosed to the court, and the debtors through counsel acknowledged, that the restaurant real property owned by the debtors had been surrendered and conveyed to a creditor without the court's knowledge or approval. Debtors' counsel advised the court that the debtors would need additional time to file a second amended plan because they could not afford the $1,200.00 plan payment proposed by them in the amended plan filed on December 7, 1998, and that it would be another thirty days before plan payments could be recommenced. In light of the unauthorized conveyance, the debtors' admission that their proposed plan was not feasible as required by 11 U.S.C. § 1325(a)(6), the fact that debtors had failed to submit a confirmable plan despite the passage of over ten months under the protection of chapter 13, and the fact that the debtors had not made any payment to the chapter 13 trustee

in the previous six months, the court concluded that an immediate reconversion to chapter 7 was necessary to protect the estate from further diminishment. Accordingly, the court entered its order reconverting the case to chapter 7 for liquidation on January 13, 1999.[1]

On January 15, 1999, the debtors acting *pro se* filed a "NOTICE OF APPEAL AND MOTION TO DISMISS", appealing the court's order reconverting the debtors' case to chapter 7 and asking that the case be dismissed "according to 28 U.S.C. § 1406 [presumably § 1408]" because "Oklahoma is and has been debtors[']' place of residence." Also on January 15, 1999, Mr. Smith, citing differences with the debtors and that the debtors and Mr. Smith were in agreement that he should withdraw as counsel for the debtors, moved to withdraw from the case. This request was granted by order entered January 19, 1999.[2] On February 1, 1999, the debtors moved for stay pending appeal. This motion was denied by this court in a "MEMORANDUM AND ORDER"

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[1]Findings of fact and conclusions of law in regard to the reconversion order were set forth by the court in a memorandum filed January 15, 1999.

[2]In a "REPLY TO MEMORANDUM" filed by the debtors on January 22, 1999, the debtors noted that they had asked Mr. Smith to withdraw from the case and attached a copy of their letter faxed to him on January 14, 1999, stating that "[w]e will no longer require your services concerning [this] case. Please submit your withdrawal to the court."

entered February 3, 1999. The court noted therein that it had taken no action on the debtors' motion to dismiss, concluding it had no authority to do so in light of the pending appeal, but observed that the debtors in both their original and amended petitions had stated under penalty of perjury that they had been domiciled or had a residence, principal place of business, or principal assets in this district for 180 days preceding the date of the petition. This court also noted that "regardless of whether venue was proper in this district, lack of venue over a proceeding may be waived either by consent or conduct of a party. By filing their bankruptcy case in this district, the debtors waived any right to assert the impropriety of venue. *See In re Fishman*, 205 B.R. 147, 149 (Bankr. E.D. Ark. 1997)."

On February 12, 1999, the debtors moved for the court to reconsider its February 3 order denying the debtors' motion for stay. This request was denied by order entered February 18, 1999. Thereafter, the debtors filed an emergency motion for stay with the district court which was denied by order entered March 3, 1999.

On May 20, 1999, the debtors filed a "MOTION TO ABANDON PROPERTY" alleging that the trustee should be required to abandon all of the real property because it was exempt under Oklahoma's homestead exemption. The trustee responded that the debtors had no exemption rights in the real property, including the debtors' residence because the property had been fraudulently conveyed by the debtors to the family trust and

had been recovered by the trustee pursuant to the Agreed Order. After a hearing, the debtors' motion to abandon was denied by the court by order entered June 17, 1999. Subsequently, the debtors filed the pending motions to dismiss for improper venue and to set aside the Agreed Order on July 9, 1999, which motions, along with the trustee's responses and the trustee's proposed amended sale of assets, are presently before the court.[3]

II.

The stated grounds for the debtors' motion to dismiss is that "the proper address for both debtors at the time of the amended petition filed by T. Wood Smith was 1301 Skyline Drive, Stigler, OK 74462" although the "amended petition filed on January 2, 1998 having debtors signatures dated December 21, 1997 and December 23, 1997 reflects an address of Rt. 1, Bulls Gap, TN, 37711." The debtors "assume this to be an error on the typist part as I know Mr. Smith was aware of OK being the correct address." The debtors ask that the court "consider these inconsistency's [sic] and dismiss this bankruptcy case." The trustee responds that the issue of venue is waived since the debtors chose to file the case in this district and both the petition and amended petition signed by both debtors under the

[3]The court notes that a discharge order was entered in this case on May 25, 1999, as no objection to discharge had been filed.

penalty of perjury "reflect[s] that this was the appropriate venue for their bankruptcy."

The debtors' other motion requests that the court set aside the Agreed Order which brought the James and Coretta Fobber Trust property into the bankruptcy estate. For grounds, the debtors state that they "do not feel the property conveyed to the Fobber Trust was a fraudulent conveyance as Mr. Wyss believes.... [and] Mr. Wyss should have the burden of proof concerning his allegations." The chapter 7 trustee responds that after negotiation with the debtors' initial counsel, he "concurred that the transfer of property to the trust and the trust itself were of such a nature that the property would be returned to the bankruptcy estate in the event of litigation and that it was in the manifest best interest of the Debtors to avoid such litigation and to agree to convey the property back to the bankruptcy estate." The trustee adds that although the debtors' second bankruptcy counsel filed a motion to set aside the order, he also "concurred with the [trustee] that the conveyance would in all likelihood be returned to the bankruptcy estate in the event of litigation and withdrew his motion on January 7, 1998." The trustee states that "[i]t can be deduced from the [debtors' previous motion to set aside] that the Debtors fully understood the nature of the order and were aware

of all the ramifications of the same and were, thus, also aware of the withdrawal of the motion to set aside the subject order." The trustee contends that since more than one year has elapsed after entry of the order and the withdrawal of the first motion to set aside the order, the debtors are barred from seeking relief under Fed. R. Civ. P. 60(b)(1), as incorporated by Fed. R. Bankr. P. 9024, for mistake, inadvertence, surprise, or excusable neglect.

In the chapter 7 trustee's amended notice of sale, the trustee is proposing to sell by auction on August 17, 1999, four of the five parcels of real property located in Oklahoma, which were brought into the bankruptcy estate from the James and Coretta Fobber Trust pursuant to the terms of the Agreed Order. No creditors or parties in interest, other than the debtors, have filed an objection to the proposed sale. The debtors' basis for objecting to the sale is the same as they argue in their motion to set aside the Agreed Order: that the debtors placed the property in trust for their children and grandchildren, that the debtors believe that they "are capable of working something out with [their] creditors at this time," and that an appeal of a previous order of this court is pending before the Sixth Circuit Court of Appeals.

III.

Only the debtor Coretta Fobber, representing herself, appeared at the hearing on August 10, 1999. Prior to the hearing, Mrs. Fobber had subpoenas issued to both of her former attorneys, Messrs. Anderson and Smith, and both were present for the hearing.

Mr. Anderson testified that prior to the bankruptcy filings he had done a significant amount of legal work on behalf of Mr. Fobber, and his business Fobber Livestock. He testified that it was his recollection that he had met with both debtors prior to the first chapter 7 case being filed in May 1996 and that both debtors signed the petition in his presence, although Mrs. Fobber disputed this latter statement. With respect to the second and present bankruptcy case, Mr. Anderson stated that he had been initially contacted by Mr. Fobber and that his dealings had been predominately with Mr. Fobber here in Tennessee, although he had been in touch with Mrs. Fobber in Oklahoma. Mr. Anderson testified that Mr. Fobber signed the petition for the current case in his presence and that Mrs. Fobber signed the petition in Oklahoma. Both Mr. and Mrs. Fobber appeared at the initial meeting of creditors and it was his recollection that Mr. Fobber had testified therein that he and Mrs. Fobber had been separated for a short time at the time the petition was

filed but that they had since reunited. Mr. Anderson testified that at no point did Mrs. Fobber advise him that she did not want her case filed in Tennessee. He further testified that he had discussed with the Fobbers that the creation of the trust was avoidable as a fraudulent conveyance, the consequences of this action, and that it was in the debtors' best interests to agree to the avoidance of the trust.

Mr. Smith testified that it was his understanding that the debtors had residences in both Tennessee and Oklahoma, and that they traveled back and forth between the two residences since they had family here in Tennessee. He recalled filing on the debtors' behalf the motion to set aside the agreed order but could not recall why he withdrew the motion.

The majority of Mrs. Fobber's proof was designed to establish that she did not know of the 180-day venue requirement and therefore she did not knowingly waive venue. She introduced copies of the signature page of the amended petition sent to her by Mr. Anderson and Mr. Smith in October and December 1997, respectively, noting that neither attorney sent her at the time the first page of the amended petition which contained the requisite venue language. She also submitted into evidence memorandums dated October 16, 1997, and November 12, 1997, to Mr. Anderson from a deputy clerk of the court, which memos

recited that certain mail addressed to Mr. Fobber in Bulls Gap, Tennessee had been returned as undeliverable by the U.S. Post Office and asking Mr. Anderson to file a notice of change of address. In an affidavit filed July 9, 1999, Mrs. Fobber affirmed that she had never stated her address, "verbally or otherwise, to be anything other than 1301 Skyline Dr., Stigler, Oklahoma, 74462, where I have lived since the latter part of 1994."

Notwithstanding the evidence that Mrs. Fobber had been a resident of Oklahoma since 1994 and notwithstanding her assertion that she had no knowledge of the bankruptcy venue requirements of 28 U.S.C. § 1408 at the time she filed this bankruptcy case, at no point in this case has Mrs. Fobber ever denied that she had signed the petition initiating this case. Nor has she ever denied that she authorized her bankruptcy case to be filed in the Eastern District of Tennessee. Regardless of whether Mrs. Fobber selected the proper venue in which to file her bankruptcy case, the fact remains that she voluntarily chose this forum. It was only after she and her husband had their bankruptcy case reconverted to chapter 7 against their wishes that the debtors raised venue, some 18 months after their case was first filed in this district. The debtors' attempted grasp of this procedural straw to avoid the pending liquidation of

their assets is of no avail. *See In re Fishman*, 205 B.R. 147, 149 (Bankr. E.D. Ark. 1997) (In case where debtor moved to dismiss his case for improper venue after motions were filed by his exwife evidencing intent to file objections to discharge, court found that even if venue was improper, "there is a clear waiver of any right to object to the improper venue. Lack of venue over a proceeding may be waived either by consent or conduct of a party. [Citation omitted]. By filing his bankruptcy case in this district the debtor waived any right to assert the impropriety of venue."). Accordingly, the debtors' motion to dismiss for improper venue will be denied.

IV.

The court next turns to the debtors' motion to set aside the Agreed Order which brought the trust property into the bankruptcy estate. The debtors' motion is governed by Fed. R. Civ. P. 60(b), as incorporated by Fed. R. Bankr. P. 9024. Although the debtors fail to articulate any specific ground thereunder, the purported ground is that they "do not feel the property conveyed to the Fobber Trust was a fraudulent conveyance as Mr. Wyss believes.... [and] Mr. Wyss should have the burden of proof concerning his allegations." At the August 10 hearing, Mrs. Fobber introduced a letter from the debtors to

John Anderson dated November 14, 1997, stating that they no longer needed his services. She noted that the Agreed Order was entered by the court after this date on November 18.[4] Mrs. Fobber did not testify as to whether she had authorized Mr. Anderson to sign the Agreed Order although the debtors asserted in their request for hearing concerning the trustee's proposed sale of assets that Mr. Anderson, not the debtors, agreed that the trust property was property of the estate. On the other hand, Mr. Anderson testified that he had discussed the issue with the debtors and that they had consented to his actions. Accordingly, although the evidence offered at the hearing does not support this assertion, the debtors appear to argue that the Agreed Oorder should be set aside because they did not authorize their attorney to sign the Agreed Order.

Rule 60(b) provides that a court may relieve a party from a final judgment, order or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been

[4]The court notes that the record does not reflect when the order was actually signed by Mr. Anderson, only when it was entered by the court.

> reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b). The debtors bear the burden of proving one of the six exceptions under this rule. *Drake v. Dennis (In re Dennis)*, 209 B.R. 20, 25 (Bankr. S.D. Ga. 1996).

The only arguable provision under which the debtors' motion falls is subsection (1) for mistake. However, under the specific requirement of Rule 60, a motion alleging mistake, inadvertence, surprise, or excusable neglect must have been brought within one year from entry of the Agreed Order on November 18, 1997. The clerk's certificate of service for the Agreed Order plainly evidences that both debtors were served with copies of the order on the date of its entry and, therefore, were aware of the order. Moreover, more than eighteen months expired between the filing of the present motion and the date that the debtors' second bankruptcy counsel withdrew the debtors' motion to set aside the Agreed Order on January 7, 1998, which alleged that the agreed order "may have been filed with the erroneous agreement of ... former counsel for the debtors" and at the time the agreed order was filed the debtors "had discharged their previous counsel."

Because the ground for the debtors' motion falls within subsection (1), subsection (6) which concerns "any other reason justifying relief" is unavailable. "Rule 60(b)(6) is generally invoked 'only in exceptional or extraordinary circumstances which are not addressed by the first numbered clauses of the Rule.'" *Nat'l Mortgage Co. v. Brengettcy*, 223 B.R. 684, 692 n.9 (W.D. Tenn. 1998)(quoting *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989)). Even were the court to consider the motion as one being made under Rule 60(b)(6), the court cannot conclude that it was made within a reasonable time due to the prejudice to the estate and creditors which would result from such a finding. The debtors' motion to set aside the Agreed Order was filed on July 9, 1999, more than two years after entry of the order for relief on June 4, 1997. If the court were to set aside the Agreed Order at this time, the chapter 7 trustee would be time-barred from bringing a fraudulent conveyance action by the two-year stautue of limitations set forth in 11 U.S.C. § 546(a)(1). Furthermore, the debtors have already been granted a discharge.

Assuming that the debtors were not time-barred from bringing a Rule 60(b) motion, they would still have to demonstrate that they have a meritorious defense to the fraudulent conveyance claim. *See Johnson v. Eisinger (In re Empire Pipe & Dev.,*

Inc.), 134 B.R. 975, 977 (Bankr. M.D. Fla. 1991). In this regard, the debtors have utterly failed.

The evidence establishes that the debtors, as settlors, set up a revocable *inter vivos* trust known as the James Edward Fobber and Coretta May Fobber Trust on December 9, 1994. The trust agreement made the debtors the trustees under the trust and provided that during their "lifetimes all of the net income and principal of the Trust shall be paid to or for the benefit of the Settlor(s) or to such other persons or concerns as they, or the survivor of them, may from time to time direct...." Upon the death of the survivor of the settlors, all of the assets of the trust were to be distributed to the debtors' two children. The agreement, *inter alia*, gave the debtors as trustees the right to sell, exchange, dispose, or abandon any of the trust property. However, the agreement prohibited any beneficiary of the trust from assigning or encumbering his or her share of either the principal or the income and noted that no beneficiary's interest shall be subject to his or her liabilities, obligations, or the claims of creditors. The trust agreement also provided that during their lifetime, the debtors as settlors "shall have the right to alter, amend, revoke or terminate this Trust, in whole or in part, or any provision hereof, and/or to require full or partial return and

distribution of the trust estate....” Lastly, the trust agreement noted that the situs of the trust was the state of Oklahoma and that the Trust was to be construed according to Oklahoma laws.

On December 21, 1994, for a stated consideration of $10.00, the debtors quitclaimed seven tracts of real property to the James and Coretta Fobber Trust. Also on that date for a stated consideration of $1.00, the debtors transferred all of their personal property into the trust. On May 11, 1995, the James and Coretta Fobber Trust purchased certain restaurant real property from Selrahc, Limited Partnership. As consideration for the purchase, the debtors individually and as trustees of the trust executed a $40,000.00 promissory note and gave a mortgage on the restaurant property. Also on that date, the debtors, individually and as trustees of the James and Coretta Fobber Trust, signed a promissory note for $125,000.00 in favor of Selrahc and gave it a mortgage on the seven parcels of real property which had been transferred into the trust.

On September 11, 1996, within one year prior to their initiation of this case, the debtors amended the James and Coretta Fobber Trust to make it irrevocable and to delete the provision which gave them unlimited access to both the principal and the income. The amendment provided that if the debtors

became incapacitated, the trustees could apply any of the trust assets toward the health, support and maintenance of the debtors.

The debtors argue that they set up a valid trust and that none of the trust property would be an asset of the estate but for the Agreed Order. Although not cited, the debtors are apparently relying on 11 U.S.C. § 541(c)(2) "which provides that an interest of the debtor which would otherwise be property of his bankruptcy estate under 11 U.S.C. § 541(a)(1) is nevertheless excluded from his bankruptcy estate if it is a beneficial interest in a spendthrift trust which is valid and enforceable under applicable State law." *In re Ree*, 114 B.R. 286, 289 (Bankr. N.D. Okla. 1990). Thus, if the debtors had a valid and enforceable spendthrift trust under Oklahoma law, then any interest they had in the trust would not be property of their bankruptcy estate. However, it is clear that prior to the trust amendment on September 11, 1996, the James and Coretta Fobber Trust was not an enforceable trust under Oklahoma law, notwithstanding its alienation provision, because the debtors both set up the trust and were beneficiaries under it. OKL. ST. ANN. 60 § 175.25(H) provides that "[n]othing in this act shall authorize a person to create a spendthrift trust or other inalienable interest for his own benefit. The interest of the trustor as a beneficiary of any trust shall be freely alienable and subject to the claims of his creditors." For purposes of the Oklahoma Trust Act, "'[b]eneficiary' means any person entitled to receive from a trust any

benefit of whatsoever kind or character." OKL. ST. ANN. 60 § 175.3(K). As stated by the court in *Williams v. Threet (In re Threet)*, 118 B.R. 805 (Bankr. N.D. Okla. 1990):

> Debtor's interest in the pension plan was not an interest in a spendthrift trust because he had the absolute right to obtain the fund. This right to obtain the funds is a complete antithesis to a spendthrift trust. Also the funds in the trust were contributed by the Debtor and, therefore, the trust was self-settled. Under the law of spendthrift trusts including the statutory law of Oklahoma a self-settled trust cannot be spendthrift. [Citations omitted.] In conclusion the Debtor's interests in the retirement fund are property of the estate and are not the subject of a spendthrift trust and should be turned over to the Trustee.

Id. at 808. *See also In re Dickson*, 114 B.R. 740, 742 (Bankr. N.D. Okla. 1990)("Under Oklahoma law, the spendthrift provisions of a self-settled trust of which the settlor is also the beneficiary are not enforceable...."); *In re Ree*, 114 B.R. at 289 ("Self-settled spendthrift trusts of which the settlor is beneficiary are not enforceable under Oklahoma law ... in furtherance of a traditional public policy guarding against a strong potential for fraud and abuse.").

Thus, if the debtors' bankruptcy case had been filed prior to the trust amendment, all trust assets would be property of the estate under § 541(a). *See In re Cowles*, 143 B.R. 5, 7 (Bankr. D. Mass. 1992)("where the debtor, 'in one capacity or another' dominates all aspects of the trust to the extent that he exercises absolute dominion and control over the assets, his interest in the trust constitute[s]

property of the estate"). Because the debtors amended the trust agreement prior to the bankruptcy filing to limit their access to the trust assets and made the trust irrevocable, the argument could be made that these amendments rendered the trust enforceable under state law such that the trust property would not be property of the estate within the contemplation of § 542(c)(2). However, the problem with this argument is that the amendments took place within one year of the bankruptcy filing. The power to revoke their family trust was a property right of the debtors. *See O'Conner v. O'Conner (In re O'Connor)*, 32 B.R. 626, 628 (Bankr. E.D. Pa. 1983)(debtor's prepetition surrender of the power to revoke trust was a transfer of property of the debtor within the meaning of § 727(a)(2)(A)). Under 11 U.S.C. § 548(a)(1), a trustee may avoid as a fraudulent conveyance any transfer of the debtor's property that took place within the year before the date of the filing of the petition if (A) the transfer was made with the actual intent to hinder, delay, or defraud or (B) the debtor "received less than reasonably equivalent value in exchange for such transfer" and "was insolvent on the date that such transfer was made ... or became insolvent as a result of such transfer...." Mrs. Fobber testified at the hearing that she and her husband received no consideration for the September 11, 1996, amendments to the trust agreement. Furthermore, the debtors' own schedules in both of their bankruptcy cases establish that they were insolvent on the date the

transfer, *i.e.,* the amendments of September 11, 1996, was made or that they were rendered insolvent as a result of the transfer. The schedules filed on May 22, 1996, less than four months prior, indicate that excluding the trust property, the debtors had assets of $13,800.00 and liabilities of $447,100.00. Included in these list of liabilities is a scheduled debt to Tri-State LVS for $200,000.00. Mrs. Fobber indicated at the hearing that this was not a valid claim because a settlement agreement had been negotiated with the creditor in 1994, although Mr. Anderson testified that he could not remember if this settlement was ever finalized. The court notes, however, that the schedules filed by the debtors in the second case on June 4, 1997, list the debt to Tri-State LVS in the amount of $68,000.00 and the amended schedules filed on January 2, 1998, set the amount at $65,000.00. Even if the debt to Tri-State LVS were $0.00, the debtors' liabilities appear to have exceeded their assets at the time of the transfer. Thus, based on the evidence submitted to the court, the debtors' trust amendments, to the extent they rendered the trust assets beyond the reach of the debtors' creditors, was a fraudulent conveyance under § 548(a)(1)(B) because it was made without consideration while the debtors were insolvent.

There is also a strong suggestion in the record which would support the conclusion that the transfer was made with the actual intent to hinder or delay creditors. The proofs of claims filed in this case evidence that prior to creation of the trust in

December 1994, James Fobber owed the Abingdon Livestock Exchange, Inc. over $200,000.00 for delivery of livestock between October 31 and November 8, 1991, and over $30,000.00 to Robert Hatcher for partnership losses in August 1993. Micro Chemical, listed in the debtors' schedules as having a fixed and liquidated claim of $32,000.00, has filed a proof of claim for $30,811.63 for a debt incurred in 1993. Farmland Industries, Inc. has filed a proof of claim in the amount of $75,433.09 for a debt incurred in June 1994 through August 1994. Thus, when the debtors transferred all of their real and personal property to their family trust in December 1994, they owed well in excess of $300,000.00 to their creditors.

Furthermore, the timing of the judgments and the debtors' actions in response thereto are suggestive of an intent to delay creditors. According to the proofs of claims, default judgments against the debtors were entered on February 14, 1996, in favor of Micro Chemical, Inc. in the amount of $31,727.96, and on May 15, 1996, in favor of Farmland Industries in the amount of $66,957.87. The court notes that exactly one week after the judgment was entered in favor of Farmland Industries by a Kansas state court, the debtors filed their first chapter 7 petition in Tennessee on May 22, 1996. After the bankruptcy court refused to set aside an order granting relief from the stay, the debtors

allowed their first case to be dismissed on August 22, 1996. Less than a month later, on September 11, 1996, the debtors made their family trust irrevocable. Subsequently, on March 11, 1997, the debtors, appearing *pro se*, asked the Kansas state court to set aside the Farmland Industries default judgment, which motion was denied on May 5, 1997. Less than a month after this denial, on June 4, 1997, the debtors commenced their current chapter 7 case, failing to disclose initially any of the trust assets or their transfers into the trust. After the trust property was brought into the estate and the trustee retained the services of an auctioneer in order to proceed with the sale of the property, the debtors sought dismissal of the chapter 7 case. When objections were raised to the dismissal, the debtors attempted chapter 13 where they languished for ten months at the expense of their creditors without proposing a confirmable plan or making their required chapter 13 plan payments. When their chapter 13 efforts failed and the case was reconverted to chapter 7, the debtors for the first time raised the question of appropriate venue even though they undisputedly voluntarily chose this forum to file chapter 7, not once but twice. The trustee represented in a motion for assistance of the U.S. Marshall Service filed on July 22, 1999, that the debtor James Fobber attempted to intimidate the court-appointed auctioneer

and damaged her vehicle after she visited estate property on one occasion. The trustee also represented in the motion that the debtors' daughter threatened to destroy the estate property on which she resides. At the August 10 hearing, in response to questioning by the chapter 7 trustee, Mrs. Fobber acknowledged that her husband has recently attempted to purchase space in the Stigler newspaper next to the auctioneer's advisement concerning the upcoming sale in what was an apparent effort to chill the sale. The court only conclude from the debtors' pattern of conduct that their actions are purposely designed to delay, hinder, and defraud their creditors.

Finally, the debtors have asserted in their brief submitted in support of their motion to set aside that they are entitled to exempt all of the trust assets, including their residence, even though no verified amended schedule or list of exemptions has been filed as required by 11 U.S.C. § 522(l) and Fed. R. Bankr. Pro. 1008 which asserts an exemption in these assets. Nonetheless, notwithstanding the procedural defects in the debtors' exemption claim, substantive law does not support the debtors' claim. Under § 522(g)(1)(A) of the Bankruptcy Code, debtors may exempt otherwise exemptible property that the trustee brings into the estate by means of his avoidance powers as long as the transfer was involuntary and the property

involved was not concealed by the debtor. 4 COLLIER ON BANKRUPTCY ¶ 522.12[1](15th ed. rev. 1999). Because the transfer in the present case was not involuntary, the debtors' asserted exemption in the trust property must be disallowed. *See Trujillo v. Grimmet (In re Trujillo)*, 215 B. R. 200, 205 (B.A.P. 9th Cir. 1997)(Bankruptcy Code explicitly disallows the claim of exemption for property which the debtor voluntarily transferred; thus, the debtors were unable to claim exemptions in their house and vehicles which they had transferred to their adult children and which the trustee had recovered as fraudulently conveyed property).

V.

In light of the foregoing, an order will be entered contemporaneous with the filing of this memorandum opinion denying the debtors' motions and authorizing the chapter 7 trustee's proposed sale to proceed.

FILED: August 11, 1999

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE